Supreme Court, U.S.
FILED
JUN 9 1995
OFFICE OF THE CLERK

No. 94-1528

IN THE
Supreme Court of the United States
OCTOBER TERM, 1994

HORACE SOLOMON, *et al.*,
Petitioners,

v.

RESOLUTION TRUST CORPORATION,
AS RECEIVER FOR NASSAU SAVINGS AND
LOAN ASSOCIATION, F.A.,
Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Second Circuit

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REPLY BRIEF OF PETITIONERS

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June 9, 1995

WILSON - EPES PRINTING CO., INC. - 789-0096 - WASHINGTON, D.C. 20001

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REPLY BRIEF OF PETITIONERS

By what it concedes and what it omits, the RTC's Opposition confirms that this case presents at least four important doctrinal conflicts, each of which merits certiorari. These are:

1. The basic issue in this case is whether "contract or lease . . . to which such institution is a party" in 12 U.S.C. § 1821(e) is broad enough to pre-empt obligations imposed by state law on a relationship that began with a contract, but where state law has abrogated and displaced the terms set forth in the contract—here, the occupancy term and the rental amount. The position of the RTC embodied in the decision below is that where a relationship is "created by" a contract, obligations imposed by state law on the parties to that relationship are

considered part of the contract and rise or fall with the contract. Opp. 8, 13-15; Pet. App. 18a-19a. This expansive approach to this recurring and significant preemption issue is contradicted by *American Airlines, Inc.* v. *Wolens*, 115 S. Ct. 817, 824, 826 & n.5 (1995), where the passenger-airline relationship was created by a contract, and indeed by the government's own brief in *American Airlines* (which the RTC's Opposition completely ignores). See Pet. 14 & n.6. It is also in conflict with the other decisions cited in the Petition at pages 15-18, in each of which the relationship was created by a contract. What RTC offers as a critical distinction—the initiation of the relationship by a contract—is no distinction at all.

The conflict is made most evident by prior decisions addressing (1) rent control and other housing laws and (2) FIRREA. *First*, RTC entirely ignores *Troy Ltd.* v. *Renna*, 727 F.2d 287 (3d Cir. 1984), and *Thorpe* v. *Housing Authority*, 393 U.S. 268 (1969), both cited in the Petition at page 16 and footnote 7. In *Troy*, although the tenancy was created by a lease, from the outset, as here, the tenancy was subject to statutory requirements concerning duration and eviction. New Jersey then modified its statutory tenancy laws to "enlarge[] the terms of a statutory tenancy." 727 F.2d at 297. The landlords in *Troy* argued, as RTC does here, that the statutory requirements should be considered part of the contract—and, thus, that their modification was an impairment of the contract. *Id.* The Third Circuit squarely held that the statutory requirements were "non-consensual" and thus *not* part of the contract. *Id.*

In *Thorpe*, the tenancy was created by a lease and was subject to HUD regulations. HUD subsequently changed the regulations to make eviction more difficult. 393 U.S. at 272. The Court held that this change was not an impairment of contract because "[a]lthough the [HUD] circular supplements the contract in the sense that it imposes upon the [landlord] an additional obligation not

contained in the contract, that obligation is imposed under HUD's *wholly independent* rule-making power." *Id.* at 279 (emphasis added). As RTC's silence implicitly concedes, the decision below holds, in conflict with *Troy* and *Thorpe*, that statutory and regulatory eviction restrictions are part of the contract and are not independent of it. Pet. App. 18a-20a, 50a.

Similarly, RTC fails to distinguish *Saravia* v. *1736 18th St., N.W., Ltd. Partnership*, 844 F.2d 823 (D.C. Cir. 1988), and *In re Chicago, Rock Island & Pacific Railroad*, 772 F.2d 299 (7th Cir. 1985), *cert. denied*, 475 U.S. 1047 (1986). RTC concedes, based on these cases, that state housing laws generally continue to supply the terms and conditions for statutory tenancies after purported rejection of the lease, but RTC argues that rent control provisions somehow are different. Opp. 15-16. This ignores that the state laws applied in *Rock Island* after the purported rejection were *rent control* laws. See 772 F.2d at 302-03. RTC also ignores the rationale of *Saravia*: "[T]he public obligations imposed by [state] law are simply not implicated by the right of rejection. Rejection of the leases did no more than release the debtor from the contractual obligations undertaken in those leases. The debtor does not cease to be a landlord simply by virtue of rejection of the leases, and there is no reason to exempt the [debtor] from obligations imposed by local law on all landlords." 844 F.2d at 826-27; see also *id.* at 827 ("the obligations imposed by [state statute] . . . are *independent* of private leases") (emphasis added). Of course, the Second Circuit held precisely the opposite. See Pet. App. 18a-19a, 52a.

Second, RTC seeks to distinguish the cases interpreting the word "agreement" in 12 U.S.C. § 1823(e) (see Pet. 16), a related provision of FIRREA, by conceding that in those cases the "obligations created by state law" were "independent of any private agreement." Opp. 14. But this concession gives away the RTC's central argument,

because in each of the cases cited, the relationship, as here, was initially created by a private agreement. See, *e.g.*, *Bateman* v. *FDIC*, 970 F.2d 924, 927 (1st Cir. 1992) (owner consented that contractor do work); *Patterson* v. *FDIC*, 918 F.2d 540, 541 (5th Cir. 1990) (a mortgage). Thus, the cited cases squarely hold that obligations imposed by state law on parties to a relationship may not be considered part of an "agreement" under FIRREA solely on the basis that the relationship was commenced by an agreement. As RTC concedes (Opp. 8, 13-15), the decision below holds to the contrary.

2. This Court has emphasized that pre-emption of state law, particularly state real property law, may be found only if "the implication is *unambiguous*." *BFP* v. *RTC*, 114 S. Ct. 1757, 1765 (1994) (emphasis added). See also *New York State Conf. of Blue Cross & Blue Shield Plans* v. *Travelers Ins. Co.*, 115 S. Ct. 1671, 1677 (1995) (it is improper "to read the presumption against pre-emption out of the law whenever Congress speaks to the matter with generality"). Although the RTC has filed two briefs in this Court and three in the Second Circuit, it has *never* mentioned this fundamental pre-emption standard, much less argued that it was satisfied. (Neither did the Second Circuit in its two opinions). Indeed, far from attempting to demonstrate statutory clarity, the RTC concedes that the interpretative issue in this case "is a complex one." Opp. 18. RTC thus evidently believes that normal pre-emption standards do not apply to it. The FDIC concurs, as it has announced its intention to use the decision below as its principal case law support for its expansive pre-emption arguments. See Pet. 22 n.10. The issue whether the normal pre-emption standards apply to RTC and FDIC plainly warrants this Court's review.

3. The stark position of the RTC and the decision below is that *O'Melveny & Myers* v. *FDIC*, 114 S. Ct. 2048 (1994), is strictly a decision about federal common law and has no role to play in the "interpretation

of a federal statutory provision." Opp. 10; see Pet. App. 11a-13a. This position is wholly untenable because the first half of *O'Melveny* is devoted entirely to statutory interpretation, specifically interpreting the meaning of "rights . . . of the insured depository institution" in 12 U.S.C. § 1821(d)(2)(A)(i). See 114 S. Ct. at 2054.

Equally unsupportable is RTC's position that *O'Melveny*'s rejection of "more money" arguments is limited to "federal common-law" issues and has no application to statutory interpretation cases. Opp. 12-13. To the contrary, *O'Melveny* expressly held that nothing in "*FIRREA* . . . sets forth any anticipated level for the fund" or any "federal policy that the fund should always win." 114 S. Ct. at 2055. The decision below here sought to distinguish *O'Melveny* based on 12 U.S.C. § 1441a(b)(3)(C)(i). This is in direct conflict with the D.C. Circuit, however, which has held, in a decision ignored by RTC's Opposition, that it is "unreasonable" to use the "general language" of Section 1441a(b)(3)(C)(i) as a basis for a broad interpretation of a specific provision of FIRREA. *RTC* v. *Grant Thornton*, 41 F.3d 1539, 1546 (D.C. Cir. 1994). As the Petition demonstrated, the Second Circuit's reliance on Section 1441a(b)(3)(C)(i) also contradicts *O'Melveny* because the identical twin of that provision—12 U.S.C. § 1821(d)(13)(E)(i)—was applicable to the FDIC in *O'Melveny*. Pet. 22-23.

RTC's Opposition declines to defend the Second Circuit's use of Section 1441a(b)(3)(C)(i). Of course, this omission does nothing to ameliorate the conflict between the decision below, on the one hand, and *Grant Thornton* and *O'Melveny*, on the other.

Moreover, the substitute rationale proffered by RTC also creates a conflict. RTC argues that the value "enhancing" purpose of 12 U.S.C. § 1821(e) itself supports adopting a broader interpretation of 12 U.S.C. § 1821(e). This is in direct conflict with *Office & Professional Employees Int'l Union* v. *FDIC*, 27 F.3d 598, 604 (D.C. Cir. 1994), another case that RTC's Opposition ignores,

which held that the fiscal purpose of FIRREA is too general to be of any assistance in interpreting Section 1821(e). See Pet. 24. Moreover, nothing in the language or legislative history of Section 1821(e) supports using some unspoken fiscal purpose of that provision to satisfy the RTC's burden of overcoming the strong presumption against pre-emption. To the contrary, the legislative history states that Section 1821(e) only grants RTC and FDIC the traditional "rights and powers of a receiver in equity . . . to repudiate contracts." H.R. Conf. Rep. No. 222, 101st Cong., 1st Sess. 397 (1989), *reprinted in* 1989 U.S.C.C.A.N. 432, 436. Of course, a receiver in equity is indisputably bound to follow all state property laws, including rent control laws. See 28 U.S.C. § 959(b).

4. The RTC correctly concedes that the decision below "rejected" adopting state law to define whether state-imposed statutory tenancy obligations are part of or dependent on the initial contract. Opp. 8. As has been demonstrated, petitioners should prevail if federal law supplies the determinative authority. This is because federal law precedents so clearly hold that state-imposed obligations that abrogate or displace contractual terms should not be considered part of or dependent on the contract. See *supra*, at pp. 2-4.

a. Nonetheless, the adoption of state law is supported here by the parallel between the language of the statutory provision held in *O'Melveny* to require adoption of state law—"rights . . . *of the insured depository institution*" (12 U.S.C. § 1821(d)(2)(A)(i)) (emphasis added)—and the language at issue here—"contract or lease . . . *to which such institution is a party*." 12 U.S.C. § 1821(e)(1) (emphasis added). See Pet. 25-26.[1] As

[1] Adoption of state law is also supported by previously cited precedents of this Court that adopted state law to define terms in federal statutes that address real property or contractual issues—both matters traditionally governed by state law. Pet. 26-27 nn.14-15. RTC makes no attempt to distinguish these cases, but

did the decision below. RTC simply ignores the important modifying phrase "to which such institution is a party."

Instead, RTC curiously references *O'Melveny*'s citation to 12 U.S.C. § 1821(e) as somehow providing support for creating a federal rule of decision on the critical issue in this case: whether state law is part of the contract. Opp. 11. RTC omits, however, *O'Melveny*'s parenthetical description of the extent to which Section 1821(e) creates a federal rule of decision: "(precluding state-law claims against the FDIC under certain contracts it is authorized to repudiate)." 114 S. Ct. at 2054. As this omitted description illustrates, nothing in *O'Melveny* suggests that federal law determines what are contractual obligations under Section 1821(e). Section 1821(e) only addresses what may occur to preexisting contractual obligations in a receivership.

b. If the Court were to grant review and adopt state law to determine what is part of the contract, it would not be necessary for the Court itself to decide whether under New York law statutory tenancy obligations become part of or are dependent on the initial contract. *First*, as RTC effectively concedes (Opp. 17-18), the post-Second Circuit decision in *Duell* v. *Condon*, 647 N.E.2d 96 (N.Y. 1995), definitively resolves the issue as to rent-controlled tenancies. *Duell* explicitly holds that the rent-controlled "tenancy exists *not by contract but by operation of law*" and that "[a] tenant in rent-controlled premises has a right to continued occupancy

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instead cites a series of cases that involve neither real property nor contractual issues. Opp. 11. In particular, *United States* v. *National Bank of Commerce*, 472 U.S. 713, 727 (1985), involved the definition of personal property, not real property, in a tax-collection statute. This Court has emphasized that unique considerations of uniformity and revenue raising support judicial creation of federal law to vindicate the interests of the United States in tax collection but that these considerations do *not* apply to the interests of federal insurers such as RTC. *See O'Melveny*, 114 S. Ct. at 2055; *United States* v. *Kimbell Foods, Inc.*, 440 U.S. 715, 729-32, 735-37 (1979).

. . . notwithstanding the expiration of the lease." *Id.* at 98 (emphasis added).[2]

The issue may be less definitively decided under New York law as to rent-stabilized tenancies.[3] If this Court were to reverse the Second Circuit and rule that state law should be adopted to determine what obligations are part of the contract, a definitive resolution of any open

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[2] The New York cases cited by RTC (Opp. 17) stand for the unremarkable propositions that (a) rent-control tenancies begin with an agreement and (b) by statute, the owner may end the tenancy under certain conditions by converting the property to another use. As *Duell* makes clear, neither of these circumstances means that the tenancy is considered contractual under New York law. Nor, again as *Duell* makes clear, does the carry forward effect of terms unrelated to duration or rental amount, such as an attorney's fees provision, mean that the tenancy is considered contractual. *See* 647 N.E.2d at 98. *See also Hudson View Properties* v. *Weiss*, 442 N.Y.S.2d 367, 370 (App. Term 1981) (carry forward of minor provisions applies only "with the exceptions of the duration of the term and the amount of rent payable"); *Stephen Estate, Inc.* v. *Kaplan*, 100 N.Y.S.2d 455, 460-61 (Mun. Ct. 1950) ("except for the term and the rent reserved"); *130 West 57 Corp.* v. *Hyman*, 66 N.Y.S.2d 332, 334 (App. Term 1946) (statute, not original lease, specifies "the term and rental obligation"). Of course, in this case, the RTC seeks to repudiate obligations of rental duration and rental amount, which are indisputably statutory, not contractual, under *Duell*.

[3] As the Petition noted (Pet. 28 n.16), dictum in *Duell* indicates that although the "right to continued occupancy" of the rent-stabilized tenant—the issue in this case—is statutory, other aspects of the rent-stabilized tenancy are "contractual in nature" in the limited sense that the statute requires the landlord to give the tenant a document entitled "renewal lease." 647 N.E.2d at 98. *See also id.* at 99 ("we do not pass on the correctness of [rent-stabilization] decisions"). Other New York decisions have expressly held that the rent stabilized tenant's rights concerning occupancy and rental amount are "not pursuant to any agreement . . . but solely by virtue of the emergency rent laws." *DeSantis* v. *White Rose Assocs.*, 578 N.Y.S.2d 363, 367 (N.Y. Sup. Ct. 1991); *Park Summit Realty Corp.* v. *Frank*, 434 N.Y.S.2d 73, 76-77 (App. Term 1980), *aff'd*, 448 N.Y.S.2d 414 (App. Div. 1981), *aff'd*, 439 N.E.2d 358 (N.Y. 1982).

questions under New York law could readily be achieved by subsequent certification to the New York Court of Appeals. See N.Y. Const. art. VI, § 3(b)(9). Such certification could occur either directly from this Court, see, *e.g.*, *Virginia* v. *American Booksellers Ass'n*, 484 U.S. 383 (1988), or the Court could remand to the Second Circuit with directions to certify, see, *e.g.*, *Lehman Bros.* v. *Schein*, 416 U.S. 386, 391-92 (1974).

* * *

As has been demonstrated, this case presents important and recurring doctrinal issues of pre-emption and federalism. This case also presents issues of extraordinary practical importance.

RTC does not dispute that: (1) RTC and FDIC have indicated their intent to use the decision below as their primary authority in support of broad pre-emption arguments in a variety of contexts. See, *e.g.*, Pet. 12, 22 n.10. (2) The highest councils of RTC chose this case as a "precedent setting" vehicle. R. 269. (3) RTC's own records indicate that thousands of tenants will be evicted from their homes by the RTC if the decision below is affirmed. *Id.* at 270, 272, 276.[4] Additional statutory tenants would surely be subject to FDIC eviction. (4) As are petitioners, many of these tenants are elderly persons living in what are their family homes of 20-30 years duration.[5] In sum, important practical con-

[4] Undoubtedly, the RTC could readily determine how many RTC tenants are subject to eviction. Although RTC brought this action over four years ago and took three months to file its Opposition in this Court (receiving two extensions), that Opposition states only and cryptically the truism that evictions will be "limited." Opp. 16 n.17. For the thousands of elderly individuals who will be evicted from their homes, that their number is not infinite will provide small comfort.

[5] Without any support in the record, RTC insinuates that petitioners may be wealthy. They are not; for the most part, they are senior citizens whose fixed incomes on modest life savings have not kept pace with the rental rates in neighborhoods they moved

siderations, as well as fundamental doctrinal conflicts, make this case worthy of this Court's review.

CONCLUSION

The petition for certiorari should be granted.

Respectfully submitted,

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into decades ago. *See* Pet. 4. Also misleading is RTC's reference to a $19,000 monthly cost. Opp. 16 n.7. Since the outset, RTC could have sold the nine apartments as subject to rent regulation for an amount nearly equal to the outstanding balance on the foreclosed loan. R. 217, 233. It is RTC's unquenchable desire for "more money" (*O'Melveny*, 114 S. Ct. at 2055) that is entirely responsible for any carrying costs.

As for RTC's "policy" concerning low and moderate-income tenants (*see* Opp. 3), the complete answer is provided by the *amicus* brief of Legal Aid Services for New York City and a number of low-income tenant groups: "RTC's 'Policy Statement' is simply an internally generated statement of guidelines that is not found in statute or regulation, it can be modified, revoked, or arguably even ignored at any time, and is not a meaningful constraint on RTC's discretion." Brief *Amicus Curiae* In Support of Petition for a Writ of Certiorari at 8 (No. 94-1564).